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BRADLEY PROULX

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re:

SARA NEWSOME BURNS,

Debtor.

RICHARD KIPPERMAN, Trustee,

Plaintiff,

v.

BRADLEY PROULX, an individual,

Defendant.

Case No. 99-33191-B7

Adv. No: 01-90355-B7

Chapter 7

**REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CREDITOR BRADLEY PROULX'S
MOTION FOR SUMMARY JUDGMENT**

Date: December 17, 2001
Time: 2:30 p.m.
Ctm: 4
Judge: Hon. Peter W. Bowie

Creditor/Defendant BRADLEY PROULX ("Creditor Proulx") hereby submits the following reply memorandum of points and authorities in support of his motion for summary judgment against Chapter 7 Trustee/Plaintiff RICHARD KIPPERMAN ("Plaintiff Kipperman").

1. The Lien on Pending Action - Qui Tam Proceeds Lien.

In his papers, Trustee does not dispute that, pursuant to California Code of Civil Procedure §708.410, Creditor Proulx properly created a lien on the Qui Tam Action entitled United States of America ex rel Sara Newsome Burns v. Family Practice Associates, et al. United States District Court for the Southern District of California, Case No. 91-1325 on January 13, 1999. See Creditor's Exhibit "5."

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Pursuant to C.C.P. §708.410, a judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien to the extent required to satisfy the judgment...on the rights of such judgment debtor to money or property under any judgment subsequently procured in the action or proceeding. See C.C.P. §708.410. Accordingly, the statute specifically allows a lien upon the subject monies, and there is no requirement that the monies be an "account receivable."

Further, as the notice of lien was created on January 13, 1999, it was created well outside of the 90 day preference period.

The only argument Trustee appears to make is that the action was not "pending" as it settled more than two years prior to the date that the lien was created. However, the Court in that case specifically retained jurisdiction over the matter until such time as the installment payments under the settlement agreement between Debtor and the U.S. government were completed. See Declaration of Bryan D. Sampson attached hereto. This is further evidenced by Trustee's own documents which show that the court in the federal action rendered several judgments subsequent to the dismissal being filed, i.e., modifying the settlement agreement more than a year after the dismissal. See Trustee's Request for Judicial Notice, Exhibit "A" (Federal Action Docket) at Docket Items 129 through 132.

Based upon the foregoing, the "time for appeal" had not elapsed as the court, pursuant to the settlement agreement, is entitled to make further orders which may be appealed. Said jurisdiction did not expire until such time as the terms of the settlement agreement were complied with. Since Creditor filed its notice of lien prior to that time, the notice of lien was timely filed.

2. The ORAP Lien Was Created On All Debtor's Property.

Trustee quotes criminal law to argue that California Code of Civil Procedure §§708.120(c) and 708.110(d) are mutually exclusive of one another as allegedly the more specific statute for creating a lien pursuant to a third party debtor examination qualifies the more "general" statute. However, the Trustee fails to provide legal authority on point with regard to such an argument and for good reason—the Trustee's logic is clearly faulty in the present instance as these code sections do not qualify as "specific" and "general" statutes.

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1 Rather, the code of civil procedure specifies that service of a judgment debtor examination upon
 2 a debtor creates a lien upon "all of the debtor's property" without qualification. Accordingly, pursuant
 3 to C.C.P. §708.110, a Creditor may depose a debtor and obtain a lien upon all of the debtor's property
 4 simply by serving an order requiring the debtor's appearance. However, this statute is clearly not a
 5 general statute as it specifically specifies that a creditor may not use this code section to depose a third
 6 party other than the debtor.

7 C.C.P. §708.120, on the other hand, allows for the deposition of a third party, but in doing so,
 8 allows only for a lien upon the debtor's money in the hands of that third party. In other words, C.C.P.
 9 §708.120 is not a "specific" statute with regards to property of the debtor in the hands of third parties,
 10 but is rather a separate statute relating to the deposition of third parties. Its purpose is not to limit
 11 C.C.P. §708.110, but to prevent the repeated harassment and annoyance of third parties by a judgment
 12 creditor by limiting the reasons for and means by which they can be deposed.

13 Whatsmore, Trustee argues that judgment creditor should have served a third party ORAP to
 14 obtain its lien, however, Trustee fails to advise the Court that, in the instant case, that simply was not
 15 possible. The third party was a public entity, i.e., the federal government, located in Washington D.C.
 16 C.C.P. §708.750 requires that, if money is owed by a public entity other than a state agency, then, to
 17 obtain a lien, the judgment creditor must file the abstract or certified copy of the judgment and affidavit
 18 with the entity's auditor (or similar official when there is no auditor). C.C.P. §708.750. As evidenced
 19 by Creditor's Exhibit "5," Creditor complied with this code section.

20 Based upon the foregoing, although Trustee's argument is novel, at closer inspection, it is
 21 without merit or legal basis.

22 **3. The ORAP Lien Was Tolled.**

23 In his papers, the Trustee argues that the expiration date of a lien is only tolled by the filing of
 24 a bankruptcy petition if the California legislature specifically provides for the tolling within the statute.
 25 However, such an argument is clearly meant to misdirect this Court. For it is well settled law that
 26 Bankruptcy Code §108(c), which extends the time periods for a creditor, applies to time periods within
 27 which a creditor must bring an action to enforce a lien before the lien expires. Valley Transit Mix of
 28 Ruidoso, Inc. v. Miller 928 F.2d 354 (10th Cir. 1991); In re Hunter's Run Limited Partnership 875 F.2d

1 1425 (9th Cir. 1989); In re Morton 866 F.2d 561 (2d Cir. 1989); City of Bridgeport v. Debek 210 Conn.
 2 175, 554 A.2d 728 (1989). See also Collier's On Bankruptcy §108.04. Thus, Creditor Proulx's lien
 3 has not expired.

4 **4. The Qui Tam Monies Were Not After Acquired Property.**

5 Trustee further argues that the ORAP lien did not apply to the Qui Tam monies as said monies
 6 were allegedly "after acquired" property. However, at the time of service of the order for the Judgment
 7 Debtor's examination on November 20, 1998, Debtor BURNS admittedly had already acquired an
 8 interest in the subject monies pursuant to her settlement agreement with the Federal Government on
 9 July 1, 1996. In fact, the monies were being paid to Debtor at the time of the liens and collection action
 10 in late 1998. See Sampson Declaration.

11 Accordingly, and based upon all of the foregoing, Creditor has a valid lien. The lien was created
 12 on all personal property of the Debtor pursuant to the service upon Debtor with a Court Order requiring
 13 the Debtor to appear for her judgment debtor examination.

14 **5. Creditor's Turnover Order Created A Levy Lien.**

15 Trustee disputes that an execution lien was created by the service of the turnover order.
 16 However, what Trustee fails to recognize is that the turnover order, along with the writ of execution,
 17 was served upon both the Debtor and the Federal government. C.C.P. §700.170 specifies that, to levy
 18 upon an account receivable or general intangible, the levying officer shall personally serve a copy of
 19 the writ of execution and a notice of the levy on the account debtor. Accordingly, the only question is
 20 whether or not a turnover order constitutes a notice of levy.

21 California Code of Civil Procedure §699.540 requires that a notice of levy must contain the
 22 following:

- 23 a. The capacity in which the person is notified;
- 24 b. A description of the property that is levied upon;
- 25 c. The person's rights under the levy (such as the rights to claim an exemption or to make
 26 a third party claim); and
- 27 d. The person's duties under the levy.

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1 As evidenced by Creditor's Exhibit "4," the turnover order and attached documents specified
 2 all of the above. Accordingly, the service of the turnover order created yet another basis for a secured,
 3 non-avoidable lien against the subject property of the Debtor.

4 CONCLUSION

5 Based upon the foregoing Creditor Proulx has secured, non-avoidable liens against Debtor
 6 Burns property. The assertion that Plaintiff Kipperman, in accordance with 11 U.S.C. §544(a)(1), has
 7 a first priority and prevailing lien in the entire \$150,000 *Qui Tam* settlement cash fund must be denied
 8 as a matter of law and the proceeds must immediately be turned over to Creditor Proulx.

9 Respectfully submitted,

10 DATE: December 10, 2001

SAMPSON & ASSOCIATES

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12 By:



13 BRYAN D. SAMPSON, ESQ.
 14 Attorney for Secured Creditor
 15 BRADLEY PROULX
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